Supreme Court, U.S.
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No. 88-1239

In the Supreme Court of the United States

OCTOBER TERM, 1988

TONY J. VIOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Articles 16(1)(A) and 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 816(1)(A) and 852(a)(2) (1982 & Supp. V 1987), violate the Constitution by permitting a defendant to be convicted by the two-thirds vote of a court-martial panel containing as few as five members.

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a-2a) affirming petitioner's conviction is not yet officially reported. The opinion of the Army Court of Military Review (Pet. App. 3a-35a) is reported at 26 M.J. 822.

JURISDICTION

The judgment of the Court of Military Appeals was entered on December 1, 1988. The petition was filed on January 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1986).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Camp Casey in the Republic of Korea. He was convicted of premeditated

murder, in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918. He was sentenced to confinement for life, total forfeiture of pay, a reduction in rank, and a dishonorable discharge. The Army Court of Military Review affirmed the findi ıgs and sentence. The Court of Military Appeals granted review and summarily affirmed.

1. Petitioner and the victim were members of the same tank platoon. Petitioner was a Private First Class. The victim, Jon R. Watson, was a corporal, and, as such, occasionally supervised petitioner's work. Tr. 1090-1092. Petitioner disliked Corporal Watson. Tr. 761, 763, 1164-1165; Pet. App. 28a. That dislike began after petitioner's commanding officer imposed nonjudicial punishment on petitioner for being insubordinate to Corporal Watson. Tr. 744, 821.[1] Petitioner blamed Corporal Watson for that punishment and offered another soldier $50 if the soldier would "beat the shit" out of Watson.[2] Tr. 791-792, 1166.

During the weekend of March 1-3, 1986, 17 members of petitioner's platoon went on a ski trip to the Dragon Valley Ski Resort in Yong Pyong, Korea. The platoon leader organized the trip to reward the platoon following a field training exercise, and to allow the soldiers to relax. Tr. 505, 837-838, 1091. On the evening of March 2, a number

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[1] Nonjudicial punishment is a form of minor punishment authorized by the UCMJ. 10 U.S.C. 815 (1982 & Supp. V 1987). Petitioner's punishment was to perform "extra duty," which was to be completed after normal working hours. Tr. 1094.

[2] Petitioner made no secret of his intense dislike for Corporal Watson. He admitted expressing his contempt for Corporal Watson to other members of the platoon, Tr. 1165, and he admitted that he was "dead serious" when he tried to pay another soldier to beat up Watson. Tr. 1166. A fellow soldier testified that petitioner purchased a ski mask in November 1985 to conceal his identity because he was going to "kick Corporal Watson's ass." Tr. 1040.

of the platoon members gathered in the lobby of their hostel to play the game "Trivial Pursuit." Petitioner played and drank alcoholic beverages.[3] Tr. 896. At approximately 11:30 p.m., petitioner and Corporal Watson followed two other soldiers to a discotheque, which they discovered was closed. Tr. 510-511, 857-859, 1111; Pet. App. 5a. While the other two soldiers walked to a nearby bar, petitioner led Corporal Watson toward a dark part of the resort. Tr. 1120, 1172. Shortly thereafter, petitioner killed Corporal Watson.[4]

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[3] Petitioner's platoon leader, First Lieutenant Clays, testified that petitioner's alcohol consumption did not affect his behavior, that he played the game for four hours (ending at 11:30 p.m.), and that petitioner was in control of his actions at the end of the game. Tr. 841. On the other hand, Lieutenant Clays and several other witnesses testified that Corporal Watson was noticeably intoxicated, so much so that he could not play the game and could not be expected to defend himself or start a fight. Tr. 842-843, 866, 881-883. The Army Court of Military Review specifically found that both petitioner and his victim were "somewhat intoxicated, the victim more so than [petitioner]." Pet. App. 29a.

[4] At trial petitioner claimed that he acted in self-defense and that he lacked an intent to kill. Petitioner's story was as follows: He and Corporal Watson had crossed paths with two Koreans after leaving the discotheque. Tr. 1123-1124. Corporal Watson wanted to fight the Koreans, but petitioner restrained him. Corporal Watson then turned on petitioner, kicking him in the groin. Tr. 1126. Corporal Watson provoked petitioner to fight. Tr. 1128-1132. The fight ended when petitioner first kicked Watson in the face, then hit him with a stick. Tr. 1144. Petitioner admitted trying to hide the stick and hiding Watson's wallet. Tr. 1146-1148. Petitioner also admitted that he cleaned the blood off his shoes. Tr. 1150. The Army Court of Military Review found that petitioner's attack on Corporal Watson was unprovoked by any physical or verbal aggression by the victim, Pet. App. 30a-31a, and that "the defense's theory of the case is implausible." *Id.* at 23a. That court also concluded that petitioner's blows were calculated to kill, not merely to wound, as shown by the concentration and severity of the blows.

Petitioner returned to the hostel at approximately 12:16 a.m. Tr. 907. Another soldier, Sergeant Greene, asked him where he left Corporal Watson. Petitioner stated at various times that he left Corporal Watson at the discotheque, by the swimming pool, and at the front desk of the hostel. *Ibid.*[5] A search party was organized, but did not locate Corporal Watson. Tr. 908, 914.

Corporal Watson's body was found the next morning. Tr. 703; Pet. App. 6a. Nearby was a length of wood with blood on one end of it. Tr. 709-710; GX 21, 22; Pet. App. 7a.[6] Blood was also found on a wall near the body, indicating that the victim had been struck while on the ground. Tr. 1287, 1289; GX 8, 9. An autopsy revealed that Corporal Watson's death had been caused by a number of blunt force blows to his head. Tr. 623.

When Corporal Watson's body was found, his pants were unbuttoned and the zipper was open. GXs 8-10. Petitioner told one of the witnesses that he had hit Corporal Watson from behind with a pole while Watson was urinating. Pet. App. 9a.

Shortly after Corporal Watson's body was discovered, all of the platoon members were gathered together, informed of the death, and told that they would need to make statements. Petitioner asked two fellow soldiers to help him "get the bloody sweat pants out of my bag." Tr. 707, 771. Petitioner told another soldier that he had hidden Corporal Watson's wallet. Tr. 708; Pet. App. 9a. The wallet was later recovered from a snowbank not far from the body. The Army Court of Military Review determined

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[5] At trial petitioner admitted giving several inconsistent responses to Sergeant Greene. Tr. 1154.

[6] The stake, GX 23, was found bracing a nearby tree with the bloody end placed in the snow. The stake was placed so as to resemble similar stakes used as supports for young trees. Tr. 709, 959.

from that evidence that petitioner had hoped that the investigators would conclude that the murder was committed during the course of a robbery. Pet. App. 32a.

2. Pursuant to its authority under Art. I, § 8, Cl. 14, of the Constitution to "makes Rules for the Government and Regulation of the land and naval Forces," Congress has enacted the Uniform Code of Military Justice, which governs the size, selection process, composition, and voting procedures of courts-martial. Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A) (Supp. V 1987), provides that general courts-martial shall consist of at least five members, although any greater number is permissible. Article 25(d)(2) of the Code, 10 U.S.C. 825(d)(2), directs the court-martial convening authority[7] to select as court-martial panel members "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament."[8] Article 25(c)(1) of the Code, 10 U.S.C. 825(c)(1) (Supp. V 1987), allows an enlisted defendant to insist that at least one-third of the court-martial panel be made up of enlisted personnel equal to or

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[7] A "convening authority" is a commander who is authorized to convene a court-martial pursuant to Articles 22-24 of the UCMJ, 10 U.S.C. 822-824 (1982 & Supp. V 1987), and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States – 1984 (Manual)*. The duties of the convening authority include the selection and appointment of court-martial panel members (a practice commonly known as "detailing" members of a court-martial), directing that the accused be tried by the court-martial for the charged offenses (a practice commonly known as the "referral" of charges to a court-martial), and a post-trial review of the proceedings. See Arts. 25, 34, 60, UCMJ, 10 U.S.C. 825, 834, 860 (1982 & Supp. V 1987); see also Rules 503, 601, 1107, *Manual*.

[8] Before the court-martial panel is assembled, the convening authority is free to add, delete, or substitute panel members. Arts. 25, 29, UCMJ, 10 U.S.C. 825, 829 (1982 & Supp. V 1987).

senior in rank to the defendant and from a different military unit, unless physical conditions or military exigencies prevent such persons from being assigned to a court-martial. Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), requires a two-thirds majority vote of the panel members for a finding of guilty of all crimes not carrying a mandatory death sentence.[9] On sentencing, a two-thirds majority vote is necessary for a sentence of imprisonment less than ten years, a three-fourths majority is required for sentences of ten years' incarceration or more, and a unanimous vote is necessary to impose the death penalty.[10] The military justice system does not provide for a retrial in the event that the panel is unable to agree by the necessary majority. When that occurs, the defendant is automatically acquitted. Rule 921(c)(3), *Manual.*

3. Petitioner's trial convened on April 21, 1986. He pleaded not guilty and requested that the court-martial panel be composed of both officer and enlisted members. Tr. 8. Originally, nine members were detailed to petitioner's court-martial. Tr. 226. The trial judge granted two of petitioner's three challenges for cause. Tr. 424-427. Each party exercised one peremptory challenge, Tr. 428, leaving a court-martial panel consisting of five members. The defense then moved the trial court to hold that the Sixth Amendment jury trial right applied to courts-martial and that the panel, consisting of less than six members,

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[9] Rule 1004, *Manual*, requires a unanimous verdict as a prerequisite to the imposition of the death penalty.

[10] See *Mendrano* v. *Smith*, 797 F.2d 1538, 1540-1541 (10th Cir. 1986); *United States* v. *Shroeder*, 27 M.J. 87 (C.M.A. 1988), cert. denied, No. 88-873 (Feb. 21, 1989); *United States* v. *Morphis*, 7 C.M.A. 748, 752-754, 23 C.M.R. 212, 216-218 (1957); *United States* v. *Walker*, 7 C.M.A. 669, 673-675, 23 C.M.R. 133, 137-139 (1957).

violated the Sixth Amendment. The trial judge denied petitioner's motion. Tr. 440.

Following the presentation of the evidence, the trial judge instructed the panel, without defense objection, that the concurrence of four out of the five members was required for any findings of guilty. Tr. 1475. He further instructed the panel members that if they reached a unanimous finding of guilty to premeditated murder or felony murder, that unanimity should be announced. Tr. 1476. The president of the panel announced that two-thirds of the panel found petitioner guilty of premeditated murder. Tr. 1481, 1489-1490.

4. The Army Court of Military Review affirmed, Pet. App. 3a-35a, noting that challenges of the nature that petitioner now makes have been repeatedly rejected. *Id.* at 34a. The Court of Military Appeals granted review on the issue presented by petitioner and summarily affirmed. *Id.* at 1a-2a.

ARGUMENT

In *Ballew* v. *Georgia,* 435 U.S. 223 (1978), the Court held that the Sixth and Fourteenth Amendments require that at least six persons serve on the jury in serious state criminal cases. In *Burch* v. *Louisiana*, 441 U.S. 130 (1979), the Court ruled that the verdict by such a six-person jury must be unanimous. Relying on *Burch* and *Ballew*, petitioner contends that his conviction by four members of a five-member court-martial panel violates the Due Process Clause of the Fifth Amendment. That contention does not warrant review by this Court.[11]

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[11] This Court has previously denied certiorari in several other cases presenting substantially the same question. *Johnson* v. *United States*, cert. denied, 109 S. Ct. 69 (1988); *Hargrove* v. *United States*, cert. denied, 109 S. Ct. 76 (1988); *Mason* v. *United States*, cert. denied, 108

1. Petitioner has not properly preserved his unanimity claim. At trial, petitioner relied solely upon the claim that the Sixth Amendment applies to trials by courts-martial and requires that the court-martial consist of at least six members. Tr. 431, 438. Petitioner did not contend, as he does now (Pet. i, 16 n.3), that due process requires a unanimous verdict. Tr. 431-438. Before this Court, petitioner has not pressed his Sixth Amendment claim (Pet. 16), but urges that a court-martial panel must consist of at least six members and that the vote of a six-member panel must be unanimous. His purpose in adding the unanimity argument is clear: If the court-martial had consisted of six members, the military rule requiring a two-thirds majority vote to convict would have required the concurrence of only four members, which was the same number required to convict with a panel of five. Because petitioner did not raise the unanimity claim at trial, however, the trial judge's instructions to the panel regarding the degree of concurrence required to convict cannot be held erroneous unless they amounted to plain error. For the reasons discussed below, petitioner cannot meet that standard.

2. There is no conflict among the circuits on the question presented by petitioner. The military courts have consistently rejected the claim that the court-martial system established by Congress is invalid under *Burch* v. *Louisiana, supra,* and *Ballew* v. *Georgia, supra,* because a servicemember may be convicted by a two-thirds vote of the court-martial panel. *United States* v. *Mason,* 24 M.J. 127, 128 & n.* (C.M.A. 1987), cert. denied, 108 S. Ct. 257 (1987); *United States* v. *Hutchinson,* 17 M.J. 156,

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S. Ct. 257 (1987); *Delacruz* v. *United States*, cert. denied, 481 U.S. 1052 (1987); *Dodson* v. *United States,* cert. denied, 479 U.S. 1006 (1986); *Garwood* v. *United States*, cert. denied, 474 U.S. 1005 (1985); *Hutchinson* v. *United States*, cert. denied, 469 U.S. 981 (1984).

156-157, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984); see *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986); *United States* v. *Kemp*, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973) (the Sixth Amendment cross-section requirement is inapplicable to court-martial panels). The decisions of that court are consistent with the decision of the only federal court of appeals to consider the issue in light of this Court's decisions in *Burch* and *Ballew*. *Mendrano* v. *Smith*, 797 F.2d 1538, 1544-1547 (10th Cir. 1986).

3. The decision below is correct. The statutes governing the number of members on court-martial panels and the number that must concur to return a verdict do not offend either the Fifth or Sixth Amendments to the Constitution.

a. Petitioner seeks to impose on courts-martial the same requirements that Art. III, § 2, Cl. 3, and the Sixth Amendment impose in civilian cases. It is well settled, however, that the right to a jury trial that is guaranteed by those provisions does not apply to court-martial proceedings. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858).[12] The Fifth Amendment specifically exempts

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[12] See also *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States*, 107 S. Ct. 2924 (1987); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921); *Mendrano* v. *Smith*, 797 F.2d at 1544; *King* v. *Moseley*, 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961). See *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate the Sixth Amendment). See generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial*

"cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan,* 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin,* 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Article III or Sixth Amendment right to a trial by a petit jury, he also had no right under those provisions to a unanimous vote by a jury composed of at least six persons.

b. Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States,* 107 S. Ct. 2924, 2931 (1987). See also *Burns* v. *Wilson,* 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the composition and voting procedures of a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter

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and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957).

appropriate for congressional action," *Whelchel* v. *McDonald,* 340 U.S. 122, 127 (1950) (citations omitted),[13] but also because the practices at issue have been carried forward from the earliest days of our nation. Cf. *Solorio* v. *United States,* 107 S. Ct. at 2928-2930.

The nation's first military law was the American Articles of War of 1776. 1 & 2 W. Winthrop, *Military Law and Precedents* 47, App. 961-971 (2d ed. 1920). Section 14, Art. 1, provided that at least 13 officers would serve on general courts-martial (*i.e.,* a president and 12 members). 5 J. Continental Cong. 800 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra,* App. 967. In 1782, Congress substantially adopted the English practice for naval courts-martial of detailing five officers to a court-martial in a capital case and three in a noncapital case. 22 J. Continental Cong. 325 (G. Hunt ed. 1914). Four years later, when large numbers of desertions and an understaffing of officers had become a particularly acute problem for commanders at frontier outposts, Congress amended the American Articles of War to permit a quorum of five officers at a general court-martial and three officers at regimental courts-martial when 13 members could not be detailed "without manifest injury to the service." 30 J. Continental Cong. 145, 316 (J. Fitzpatrick ed. 1934); 1 & 2 W. Winthrop, *supra,* at 22-23, App. 972; Van Loan, *The Jury, the Court-Martial, and the Constitution,* 57 Cornell L. Rev. 363, 384-385 n.118 (1972). That language was merely advisory to the officer responsible for appointing the members of a court-martial, however, and his decision to select a small number of members was both lawful and

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[13] See also, *e.g., Rostker* v. *Goldberg,* 453 U.S. 57, 64-65 (1981) (the decisions of Congress are entitled to particular deference when they involve "Congress' authority over national defense and military affairs").

conclusive. *Martin* v. *Mott,* 25 U.S. (12 Wheat.) 19, 34-35 (1827).[14]

Congress endorsed that practice throughout the nineteenth century and the early part of the twentieth century when revising the Articles of War. 1 & 2 W. Winthrop, *supra,* at 77, 159; American Articles of War of 1806, ch. 20, Art. 64, 2 Stat. 367, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 981-982; American Articles of War of 1874, Art. 75, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 992; American Articles of War of 1916, ch. 418, Art. 5, 39 Stat. 651. In the aftermath of World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice. In so doing, Congress retained the requirement of a quorum of five members for general courts-martial, as well as the convening authority's discretion to detail a greater number of panel members, the system that exists today. Art. 16, UCMJ, 10 U.S.C. 816 (1982 & Supp. V 1987).

History also shows that unanimity has never been a feature of court-martial proceedings.[15] The American Articles of War of 1776, like their predecessor, the British Articles of War,[16] required only a simple majority vote

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[14] See also *Bishop* v. *United States,* 197 U.S. 334, 339-340 (1905); *Mullan* v. *United States,* 140 U.S. 240, 245 (1891) (convening officer's determination that trial by members junior in rank to the accused could not be avoided was proper).

[15] During the Revolution, the Continental Congress adopted the British naval regulations for use by the Continental Navy. The British regulations provided for courts-martial similar to the general courts-martial under the British Articles of War, which required only a simple majority to convict and sentence a defendant. Van Loan, *supra,* 57 Cornell L. Rev. at 382 & n.102.

[16] The British Articles of War required a vote of 9 of 13 court-martial members to impose the death penalty. 1 & 2 W. Winthrop, *supra,* App. 943, § 15, Art. VIII. The Articles of War did not specify

to convict a defendant and a two-thirds majority to sentence him to death. Articles of War of 1776, § 14, Art. 5, *reprinted in* 5 J. Continental Cong. 801 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra*, at 377, App. 968; A. Macomb, *A Treatise on Martial Law and Courts-Martial* 144 (1809). Congress thereafter repeatedly endorsed similar majority vote requirements in statutes passed in 1800, 1806, 1862, and 1874.[17] Throughout the nineteenth century, a majority vote of the panel members was sufficient to convict a defendant of a noncapital crime, with a two-thirds vote sufficient to impose capital punishment. 1 & 2 W. Winthrop, *supra,* at 377; *Stout* v. *Hancock,* 146 F.2d 741, 742-743 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945).

Early in the twentieth century, Congress modified the voting requirements for Army courts-martial, requiring a unanimous vote to impose the death penalty or to convict a defendant of a crime carrying a mandatory death penalty. Act of June 4, 1920, ch. 227, Art. 43, 41 Stat. 795-796; *Stout* v. *Hancock,* 146 F.2d at 741-743. For all other crimes, conviction required only a two-thirds majority. At the same time, the voting requirements for courts-martial

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the number of votes necessary to convict a defendant at a general court-martial or to impose any sentence other than death. The Articles of War, however, provided that inferior courts-martial "shall give Judgment by the Majority of Voices." 1 & 2 W. Winthrop, *supra*, App. 943, § 15, Art. XII. See R. Scott, *The Military Law of England* 131 (1810).

[17] Act of Apr. 23, 1800, ch. 33, § 1, Art. 41, 2 Stat. 51 (An Act for the Better Government of the Navy of the United States); American Articles of War of 1806, ch. 20, Art. 87, 2 Stat. 369, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 984; Act of July 17, 1862, ch. 204, Art. 19, 12 Stat. 605 (An Act for the Better Government of the Navy of the United States); American Articles of War of 1874, Art. 96, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 994.

in the Navy were left untouched. Thus, only a simple majority was necessary to convict a sailor, and a two-thirds majority to impose the death penalty. See H. R. Rep. No. 491, 81st Cong., 1st Sess. 26, 74 (1949). When considering the UCMJ following World War II, Congress adopted Article 52 of the UCMJ, 10 U.S.C. 852, in substantially its present form.[18]

In 1984, Congress amended the UCMJ to coincide with proposed changes to the *Manual for Courts-Martial.* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. Concurrently, the President, acting pursuant to his rule-making authority, promulgated the current *Manual.* In 1986, Congress enacted additional changes to the UCMJ, including the addition of Article 106a, 10 U.S.C. 906a (Supp. V 1987), an espionage statute that provides for capital punishment. That year, the President modified the *Manual* to limit the imposition of the death penalty to those cases in which the court-martial panel members unanimously find the defendant guilty of an offense for which Congress has authorized the death penalty, and then only if the court finds at least one enumerated aggravating factor. Rule 1004, *Manual*; Exec. Order No. 12,550, 3 C.F.R. 192 (1986 comp.). Neither Congress nor the President sought to extend the unanimity requirement to other situations. In sum, it is clear that the five-member, two-thirds majority vote procedures in Articles 16(1)(A) and 52(a)(2) of the UCMJ, 10 U.S.C. 816(1)(A) and 852(a)(2) (1982 & Supp. V 1987), represent the longstanding and considered judgment of Congress and the President on the proper balance to be struck between

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[18] In so doing, Congress decided not to extend the unanimous vote requirement to noncapital crimes. See *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 1081-1082 (1949).

the rights of an individual serviceman and the special needs of the armed forces.

That judgment is a reasonable one. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to serve as court-martial panel members, "the basic fighting purpose of armies is not served." *Ibid.* Congress therefore has determined that the diversion of resources necessary to conduct the retrials that would result from a unanimous verdict requirement is too high a price to pay in terms of lost military preparedness.[19] Accordingly, Congress provided for only one trial, at which a two-thirds majority vote would suffice to convict.[20]

The military justice system does not exclusively favor the prosecution. The rule that no retrials are permitted in the military if there is a "hung jury" provides a defendant with "a significant recompense" for the disadvantages of not requiring a unanimous verdict. *Mendrano* v. *Smith,* 797 F.2d at 1546. Moreover, as a safeguard against an in-

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[19] Petitioner contends (Pet. 36) that requiring six members and unanimity would not require retrials, because it would apply only to those cases "where *mens rea* and not *actus rea* is in dispute." While petitioner's scenario holds true for this case, it is not true for all premeditated or felony murder cases. In particular, petitioner's argument would not necessarily be true where the defense of alibi is raised. Further, petitioner provides no reason why premeditated murder and felony murder should require unanimity while convictions of other offenses for which death or life imprisonment are authorized (*e.g.*, espionage and rape, Art. 106a, UCMJ, 10 U.S.C. 906a (Supp. V 1987) and Art. 120, UCMJ, 10 U.S.C. 920) could be accomplished by two-thirds majority vote.

[20] That judgment is certainly reasonable in a case like this one, which was prosecuted in an overseas region (Korea) that is still regarded as a combat zone.

accurate verdict by a court-martial panel, the military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. The standard of review applied by a court of military review to determine whether the evidence is sufficient to support the defendant's conviction substantially differs from, and is more generous to military defendants than, the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether it believes that the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). By contrast, a court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[21]

In addition to the more exacting standards of appellate review, the military defendant enjoys greater rights than his civilian counterpart at the pretrial and post-trial stages of the proceedings. No charge may be referred to a general

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[21] A court of military review may affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 886(c). Although nothing in the text of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence, see *Jackson* v. *Taylor*, 353 U.S. 569, 577 & n.8 (1957), the military courts have read that standard into the Act. *E.g.*, *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977).

court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. That procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a) (Supp. V 1987). After trial, the convening authority receives a report of the trial, and he may disapprove findings of guilt or reduce the sentence as a matter of clemency or as a prerogative of command. Art. 60, UCMJ, 10 U.S.C. 860 (Supp. V 1987). To assist the convening authority, the accused has the right to submit legal arguments and other matters with respect to the findings and sentence. *Ibid.* See generally, *United States* v. *Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970). In light of these special protections against the risk of inaccurate verdicts in the military justice system, petitioner has not made the "extraordinarily weighty" case necessary to overcome the longstanding congressional judgment that the court-martial system satisfies due process requirements. *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).

There is also no merit to the specific objections that petitioner asserts (Pet. 15, 24) to his trial. Petitioner's conviction is not invalid because his court-martial panel was not randomly selected from a pool containing all servicemen, including enlisted personnel of the same rank as petitioner. *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. at 128 (Sixth Amendment cross-section

requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d 1544-1547. Moreover, the fact that a military defendant receives only one peremptory challenge is of no significance, since a civilian defendant has no constitutional right to peremptory challenges at all, much less to any specific number of them. *Batson* v. *Kentucky*, 476 U.S. 79, 91 (1986); *id.* at 108 (Marshall, J., concurring) (collecting cases); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919). Finally, there is no merit to petitioner's claim that the exclusion from the court-martial panel of servicemembers who would not consider imposing the death penalty violated due process. This Court has twice recently rejected that precise claim. *Buchanan* v. *Kentucky*, 107 S. Ct. 2906, 2913-2916 (1987); *Lockhart* v. *McCree*, 476 U.S. 162 (1986).

4. Petitioner argues that the nonunanimous verdict of a five-member court-martial is inherently unreliable. To support that claim, petitioner relies on the studies cited in the lead opinion in *Ballew* v. *Georgia*, 435 U.S. at 231-243 (opinion of Blackmun, J.), which relied heavily on empirical studies of the group dynamics of civilian juries. Much of the same reasoning formed the basis for the decision in *Burch* v. *Louisiana*, 441 U.S. at 138. There are no comparable studies, however, that have addressed the dynamics of courts-martial panels.[22] In light of the func-

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[22] Petitioner argues (Pet. 26-32) that the conclusions drawn from studies of civilian juries should be applied to court-martial panels and that they rebut the conclusions in *United States* v. *Guilford*, 8 M.J. 598 (A.C.M.R. 1979), pet. for review denied, 8 M.J. 242 (C.M.A. 1980), on which the court of military review relied. Pet. App. 34a. In support of his argument, petitioner relies on an undated letter from Professor Saks that was not submitted at trial. *Id.* at 36a-45a. Professor Saks admits that he knows of no studies involving court-martial panels similar to those conducted with juries. *Id.* at 37a-38a. He admits that he is unfamiliar with the procedures used in courts-martial.

tional and compositional differences between civilian juries and courts-martial panels, the studies on which *Burch* and *Ballew* relied are not immediately applicable to the military setting. *United States* v. *Guilford*, 8 M.J. 598, 601-602 (A.C.M.R. 1979), pet. for review denied, 8 M.J. 242 (C.M.A. 1980).[23] Given the special deference due to Congress's judgments in this area, the question whether studies of the type relied upon in *Ballew* justify a change in the UCMJ should be left to Congress.[24]

5. Petitioner suggests (Pet. 9-10) that this Court's recent decision in *Solorio* v. *United States, supra,* requires a different result. He argues that the procedures at issue may have been permissible before *Solorio*, but are no longer justified now that the Court has eliminated the service-connection restriction on courts-martial. That argument is misdirected.

The *Solorio* decision did not abolish the service-connection requirement; it merely reaffirmed the traditional principle that a crime is sufficiently service-connected for purposes of court-martial jurisdiction if the

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Id. at 38a. He is therefore unable to address any effects that may result from the dissimilarities between courts-martial and jury trials.

[23] In *Burch,* the Court concluded that juries must have at least six members, in part "to provide a fair possibility that a cross section of the community would be represented." 441 U.S. at 135, citing *Williams* v. *Florida,* 399 U.S. 78, 100 (1970). That goal is inapplicable to courts-martial. The members of a civilian jury are selected at random to represent a cross-section of the community. By contrast, the members of the court-martial panel are deliberately chosen on the basis of their qualifications to sit as panel members. Art. 25, UCMJ, 10 U.S.C. 825 (1982 & Supp. V 1987).

[24] An excellent analysis of the separate nature of military society, past and present, and the reasons why Congress is the branch of government best suited to deal with military justice, is contained in Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights,* 62 N.C. L. Rev. 177 (1984).

defendant is a servicemember at the time of the commission of the crime and at the time of trial. The effect of *Solorio* is not to convert the military justice system into one closely analogous to a civilian system, in which Fifth and Sixth Amendment principles apply just as they do in the civilian courts. *Solorio* simply restored court-martial jurisdiction to a class of cases, not covered during the 18-year period following *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), consisting of certain cases in which the crimes were committed by servicemembers off the premises of military bases. The rules regarding the number and voting requirements of court-martial panels were adopted prior to the Court's decision in *O'Callahan*, not during the period between *O'Callahan* and *Solorio*. Moreover, there is no historical or logical connection between the service-connection restriction, as applied in *O'Callahan*, and the court-martial rules at issue here. The decision in *Solorio* therefore has no bearing on the validity of those rules in the military justice system.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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